

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
at ___ O'clock & ___ min ___ M
APR 27 2006

United States Bankruptcy Court
Columbia, South Carolina (33)

IN RE:

Katonya W. Washington,

ENTERED

APR 27 2006

Debtor.

KPD

C/A No. 05-14835-JW

Chapter 13

JUDGMENT

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Objection of Alaska Seaboard Partners, L.P. ("ASP") to the amended plan of Katonya W. Washington ("Debtor") is allowed. The confirmation hearing in this matter is continued until May 11, 2006 at 9:00 a.m., at which time the Court will hear further evidence from Debtor and ASP if Debtor disputes the validity or extent of ASP's lien. Debtor and ASP shall submit a joint statement of dispute by 12:00 p.m. on May 8, 2006.



UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
April 27, 2006

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Debtor.

C/A No. 05-14835-JW

Chapter 13

ORDER

ENTERED

APR 27 2006

This matter comes before the Court upon the Objection of Alaska Seaboat Partners, L.P. ("ASP") to the amended plan of Katonya W. Washington ("Debtor"). Pursuant to Fed. R. Bankr. P. 3015 and SC LBR 3015-1, the Court makes the following Findings of Fact and Conclusions of Law.¹

KPD

FINDINGS OF FACT

1. Debtor filed a petition for relief under chapter 13 on October 16, 2005.
2. ASP alleges that it is secured by an interest in Debtor's residence consisting of real property and a mobile home attached to the real property.
3. On November 15, 2005, Debtor filed a plan proposing to value the claim of ASP at \$35,900.00.
4. The proposed plan was served on ASP. ASP has not disputed the validity of service.
5. Debtor's Schedule D indicates that ASP has a mortgage on her residence; however, Debtor indicates that the amount of ASP's claim is \$0.00. Debtor's Schedules also indicate that Conseco Finance also has a mortgage on her residence; however, it appears from ASP's proof of claim that ASP is the assignee of Conseco Finance's note and mortgage.

¹ To the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are also adopted as such.

6. Debtor's Schedule B does not disclose that Debtor has an interest in a mobile home separate from her real property.

7. On November 21, 2005, ASP filed a proof of claim. Contrary to Debtor's proposed treatment of ASP in the proposed plan, ASP's proof of claim indicates that it, as the assignee of Conseco, is secured by an interest in Debtor's residence in the amount of \$96,761.49. This claim was later amended by a claim dated March 9, 2006 and filed on March 20, 2006.² ASP attached a copy of its mortgage to its proof of claim, which includes a legal description of Debtor's real property and provides for a security interest in the real property and all buildings thereon. The filed proof of claim does not evidence a security interest in a mobile home.

8. Based upon the record of this case, it appears that ASP has a first priority mortgage on Debtor's residence with a lien in the amount of \$98,028.74 as of March 9, 2006.

9. Neither Debtor nor the chapter 13 trustee has objected to ASP's proof of claim, as amended. Debtor's counsel indicated at the hearing on the Objection that she believed that ASP's lien is only against Debtor's mobile home, which Debtor asserts is not attached to Debtor's real property.

10. Debtor filed an amended plan on January 10, 2006. Debtor's amended plan does not change how Debtor proposes to treat ASP's claim in her plan.

11. ASP filed an Objection to confirmation of Debtor's amended plan on January 26, 2006. ASP's Objection asserts that Debtor's plan is not feasible because it

² ASP filed another proof of claim on January 30, 2006; however, this claim was disallowed because it appeared to be a duplicate of the first claim.

does not cure the arrearage owed on ASP's claim and that the amended plan impermissibly values ASP's first mortgage on Debtor's residence.

12. Debtor asserts that ASP should be barred from now raising the Objection because ASP failed to timely object to Debtor's original plan in accordance with this Court's Local Rules.

CONCLUSIONS OF LAW

A. ASP's objection to confirmation is untimely

Creditors are afforded a twenty-five day opportunity to object to a plan after the plan is either served or filed. See SC LBR 3015-1(e). Late objections to confirmation are generally disfavored and overruled absent a violation of the creditor's right to due process. See In re Durham, 260 B.R. 383, 386 (Bankr. D.S.C. 2001) (denying motion to vacate confirmation where creditor had adequate notice of the plan). The fact that a creditor objects to its treatment under an amended plan does not excuse the creditor from failing to object to the initial plan if the treatment of the creditor is not changed by the amended plan. See In re Thomas, C/A No. 96-79381-W, 1997 WL 33343973, slip op. (Bankr. D.S.C. July 7, 2001) (holding that service of an amended plan does not provide a creditor with a new opportunity to object if the amended plan does not alter the treatment of the creditor), In re Dangerfield, C/A No. 04-13868-W, slip op. at 3 (Bankr. D.S.C. Aug. 23, 2005) (finding that creditor could not challenge the validity of service of an amended plan, and thereby raise an objection to that plan, where the amended plan did not change the treatment of the creditor and the creditor was properly served with the debtor's first plan and failed to object).

In this case, ASP's objection to its treatment under Debtor's proposed plan is nearly two months late under this Court's local rule. See SC LBR 3015-1. Debtor's amendment to her plan does not renew the time period for ASP to object to the Plan because the amendment does not change the treatment of ASP's claim and therefore ASP's objection is untimely. See Thomas, slip op. at 7.

B. ASP's proof of claim is *prima facie* evidence of the validity of its claim

ASP's proof of claim indicates that it is secured by a mortgage on Debtor's residence and the amount owed on the mortgage. The claim is deemed to be allowed because there has not been an objection to it. 11 U.S.C. § 502(a). This claim is also *prima facie* evidence of the validity and the amount of ASP's claim. Fed. R. Bankr. P. 3001(f). Debtor has not sought to challenge the validity of ASP's claim through the appropriate process. Based on all information presently available to the Court, the Court finds, for purposes of this Order, that ASP has a valid security interest in Debtor's residence as evidenced by ASP's proof of claim.³ See In re Carr, 318 B.R. 517, 521 (Bankr. W.D. Wisc. 2004) (vacating an order confirming a chapter 13 plan, which valued a creditor's first mortgage on debtor's residence, because creditor timely submitted a proof of claim indicating its lien on the residence, debtor had not challenged the validity of the claim, and valuation of a first mortgage is not permissible under § 1322(b)(2)).

C. ASP's Objection is allowed

Unlike previous cases in which the Court has refused to allow a late objection to a plan where a creditor failed to timely object to its treatment in a properly served and noticed plan, Debtor's proposed plan in this case appears, at this point, to be un-

³ The result of this Order may change if Debtor or the chapter 13 trustee are able to successfully oppose ASP's proof of claim and establish that ASP does not have a security interest in Debtor's residence.

confirmable under chapter 13 without additional evidence to refute ASP's apparent first lien on Debtor's residence. See e.g., Thomas, 260 B.R. at 391 (overruling a late objection to plan which valued a creditor's interest in an automobile); Dangerfield, slip op. at 3 (overruling an objection to the permissible valuation of a second mortgage where creditor failed to timely object after receiving proper notice); Pope v. United Co. Lending Corp. (In re Pope), C/A No. 93-71473-D, Adv. Pro. 97-80205-W, slip op. (Bankr. D.S.C. Dec. 15, 1997) (holding that a debtor's modification of a creditor's interest rate, pre-Nobleman, was not an impermissible modification of creditor's right to payment on its first mortgage under § 1322(b)(2) where creditor was paid in full according to its proof of claim). Notwithstanding the fact that ASP did not timely object to its treatment in Debtor's proposed plan, Debtor's amended plan may not be confirmed to the extent it seeks to modify a first priority lien on Debtor's residence. See 11 U.S.C. § 1322(b)(2); In re Nobleman, 508 U.S. 324, 332, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993) (holding that § 1322(b)(2) prohibits the modification of the principal of a secured creditor's claim where creditor is secured by a debtor's residence). The Court therefore allows ASP's untimely Objection to Debtor's amended plan because it has not been confirmed and appears to impermissibly modify the rights of ASP.⁴

CONCLUSION

⁴ Under § 1325(a)(1), this Court could also *sua sponte* deny confirmation of a chapter 13 plan that proposes to value the claim of a creditor secured by a debtor's residence even though the creditor did not file a timely objection. See In re Ives, 289 B.R. 726, 728 (Bankr. D. Ariz. 2003) (holding that, even in the absence of an objection from a creditor, the court has the responsibility to ensure that a debtor's plan does not violate the anti-stripped provision of § 1322(b)(2)); In re Johnson, 160 B.R. 800, 802-803 (Bankr. S.D. Ohio 1993) (holding that the bankruptcy court did not commit an error in considering a late objection to confirmation where objection was based upon the impermissible modification of the rights of a creditor under § 1322(b)(2)); In re Gebo, 290 B.R. 168 (Bankr. M.D. Fla. 2002) (denying confirmation of a plan that appeared to modify a mortgage creditor's lien rights contrary to a presumptively valid proof of claim).

Based upon the record, ASP's objection is allowed. The confirmation hearing in this matter is continued until May 11, 2006 at 9:00 a.m., at which time the Court will hear further evidence from Debtor and ASP if Debtor disputes the validity or extent of ASP's lien. Debtor and ASP shall submit a joint statement of dispute by 12:00 p.m. on May 8, 2006.

AND IT IS SO ORDERED.

Columbia, South Carolina,
April 27, 2006


UNITED STATES BANKRUPTCY COURT